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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 69

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

ALFRED P. THOM,
W. F. DICKINSON,
R. N. VAN DOREN,
R. V. FLETCHER,
HERBERT FITZPATRICK,
GEORGE F. BROWNELL,
C. C. PAULDING,
C. B. HEISERMAN,
BEN C. DEY,
F. BARRON GRIER,
EDWARD S. JOUETT,
W. R. C. COCKE,
L. E. JEFFRIES,
FRANK H. TOWNER,
Solicitors for Appellants.

BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and SOUTH MANCHESTER RAILROAD COMPANY,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

MAY IT PLEASE THE COURT:

The brief filed herein on behalf of the United States and the Interstate Commerce Commission requires some

answer. We will deal with the arguments and statements in the order in which they are made.

(a) *The Facts.*

No exception is taken to the statement of the facts made in our brief, but in stating some additional facts, some errors have been made. On page 10 it is said that the so-called trunk lines are the principal beneficiaries under the rule which starts the per diem day at midnight. Witnesses produced by the American Short Line Railroad Association, did testify that a short railroad usually handles no overhead traffic, and is generally not in a position to average its use of cars so as to escape per diem (R. 148, 806); but it was also said that any disadvantage to any railroad resulting from starting the per diem day at midnight would obtain no matter at what time it was started, and that the same situation existed with respect to demurrage accruals. One witness further said that he did not admit that the rule was a disadvantage and thought that it had proved to be an advantage (R. 148, 149).

Moreover, the record affirmatively shows that many so-called "short lines" do handle traffic from one railroad to another and can escape per diem expense on the cars in which the traffic is hauled. Page 3 of Exhibits 29 to 40, inclusive, list 48 railroads less than 100 miles in length and which perform an intermediate line-haul service between other railroads. Each of these roads is able to handle non-owned freight cars in overhead traffic without incurring any per diem liability under the rule. In any event, the advantage of the trunk lines in this respect was not so obvious that the Commission required any change in the rule.

On page 12 of the brief it is said that the switching

reclaim rules are not mandatory as between subscribers, who are free to enter into special agreements according to the needs of local conditions. The record references there given do not support the statement made. A witness for the American Short Line Railroad Association did say that Rule 5 is not a mandatory rule (R. 143), but the subject is not referred to at page 196 of the record. The testimony of the Chairman of the General Committee of the American Railway Association was that Rule 5 is mandatory upon all subscribers in some respects, but that the reclaim rules are subject to changes to meet local or special conditions (R. 203). The operation of the reclaim rules is explained in some detail by the same witness at pages 895 and 896 of the record, from which it appears that while unchangeable reclaim rules cannot be made because of varying local conditions, any change necessary because of such conditions must be by unanimous agreement of all railroads interested.

On page 13 of the brief it is said that the obvious and admitted purpose of the Per Diem Rules discriminating against nonsubscribers is to induce or compel subscriptions to the Per Diem Agreement. The statement that any Per Diem Rules discriminate against nonsubscribers is a conclusion of counsel, as the Commission did not find that such discrimination existed. Moreover, the purpose of the rules is not solely to induce or compel subscriptions to the Per Diem Agreement, although it has always been felt that all common-carrier railroads should subscribe to that Agreement.

Reclaims were not allowed to nonsubscribers because they would not allow reclaims to subscribers or comply with the other requirements of the Per Diem Code (R. 903). The free use of non-owned freight cars was not permitted because of the undoubted right of every rail-

road company to receive compensation for the use of its cars by other railroads. Subscribers did not pay per diem on freight cars belonging to nonsubscribers in order to prevent the possibility of rebates to industries owning plant facility railroads (R. 901, 903). Thus, the purpose of the Per Diem Rules was not to produce discriminations or secure advantages for subscribers thereto, but was to produce uniformity in handling and accounting for freight cars used by railroads which did not own them, prevent violations of law, some of which would doubtless be unintentional, and secure to the owners of freight cars that compensation to which they were undoubtedly entitled when their cars are used by other railroads.

On page 13 of the brief it is also said that to require railroads less than 100 miles in length to subscribe to the Per Diem Agreement is to require them to take what the trunk lines are willing to give them. This is an erroneous view of the matter, since subscription to the Per Diem Agreement only requires a railroad to do what it should do as a common carrier. The payment of per diem for the use of non-owned freight cars, the keeping of its own accounts and allowance of reclaim in return for reclaim allowed it, are things which should be required of every railroad, whether or not it subscribes to the Per Diem Agreement of the American Railway Association. We submit that Per Diem Rules having this effect impose no hardship upon any common-carrier railroad.

At the bottom of page 13 of the brief it is said that the cost of accounting for non-owned cars used is so prohibitive that many short lines cannot afford to become subscribers to the Per Diem Agreement. The record references said to support this statement do not

support it. The witness for the Magma Arizona Railroad testified (R. 511) that he objected to settling car hire under the rules of the Association because of the extra cost, which he said was disproportionate to the volume of traffic handled by his railroad. The witness for the Appalachian Railway said (R. 660) that his road became a nonsubscriber because of the inconvenience of making reports to the owners of freight cars used by it.

The witness for the Pickens Railroad testified (R. 715) that his road canceled its subscription to the Per Diem Rules because the accounting was too much trouble and expense. The witness for the Alabama & Western Florida Railway testified (R. 711, 712) that he figured membership in the Per Diem Agreement would impose a cost on his road in excess of the reclaim received and that the principal objection to joining the Association was notifying different roads of the receipt and return of cars belonging to them. The witness for the Tennessee & North Carolina Railway testified (R. 717) that his road was not a subscriber as he thought the expense of subscription would be greater than the benefits thereof.

The roads referred to in the first report of the Commission (R. 47, 48) were the Oneida & Western, which was a subscriber at the time of the hearings before the Commission and had not then withdraw as a subscriber because of the cost of accounting for cars; the Sewell Valley Railroad, which, according to the statement of the Commission, withdrew its subscription to the Per Diem Rules because of the claim that the cost of subscription was greater than the per diem it received on its own cars; and the Appalachian Railway to which we have already referred. It thus appears that none of these railroads either became or remained nonsub-

scribers because the cost of accounting was so prohibitive that they could not afford it. On the contrary, they became or remained nonsubscribers because they were unable to make a profit through subscription.

On page 14 of the brief, it is again said that the Commission found unreasonable those provisions of the Per Diem Code which discriminated against nonsubscribers. Here again, the statement that any provisions of the Per Diem Code discriminate against nonsubscribers is a conclusion of counsel, as the Commission found no such discrimination. As a matter of fact, the record would not support such a finding and there is no claim in the brief that it would.

(b) *Paragraph (2) of the Order.*

The brief filed on behalf of the United States and the Commission seeks to justify Paragraph (2) of the order by the claim that this paragraph, properly read, requires the payment of reclaim by nonsubscriber roads. It is said (p. 22) that the requirement that similar reclaim allowances shall be made to nonsubscribers as to subscribers can only mean that both classes of railroads are to be treated alike. The facts do not support this view. At the time of the hearings before the Commission, terminal switching reclaim allowances were only made as between subscriber roads. No such allowances were made, under the rules, as between subscriber and nonsubscriber roads. The only change in this situation, required by Paragraph (2) of the order, is that subscribers must allow reclaim to nonsubscribers. This leaves nonsubscribers in the position of not being required to pay reclaim to subscribers, the position they have always occupied.

As further justifying their view, counsel say at page 22 of their brief:

> "The Commission's obvious purpose was to place nonsubscribers on an equal footing with subscribers."

We submit that this is not so. On the contrary, the obvious purpose and admitted effect of the Commission's order was to create differences and inequalities as between railroads. It is conceded that Paragraphs (3) and (5) of the order create those differences and inequalities. Moreover, the record affirmatively shows that, contrary to the view expressed in that brief (p. 22), the so-called short lines, in the proceedings before the Commission, did seek preferential treatment. They asked for advantages which they were not willing to extend to subscriber roads, urging as a justification for such preferential treatment, the shortness of their railroads, their lack of freight cars and their claimed financial disabilities.

Assuming the creation of an inequality by Paragraph (2), the brief undertakes to justify it by suggesting that nonsubscriber roads will allow reclaim without compulsion and by the assertion that in any event the Per Diem Rules could be modified so as to require them to allow it. Neither argument is good. It may not be assumed that nonsubscriber roads will spend money they are not required to spend, nor may the rights of appellants be made dependent upon the voluntary action of others. This was the effect of the constitutional provision condemned in *Louisville & Nashville R. Co. v. Stockyards Company*, 212 U. S. 132, 143, 144. Nor can appellants cure the defect in Paragraph (2) by modifying the Per Diem Rules so as to require nonsubscriber roads to allow reclaim. The rules might be so modified, but as modified, they would not and could

not impose any obligation upon a railroad not bound by them.

Although the reports and order of the Commission do not show that Paragraph (2) of the order is intended to cure a discrimination, counsel for the United States and the Commission seem to regard that as its purpose. It is then urged (p. 21) that appellants are not entitled to an election as to the method of removing the discrimination, since the Commission has the right to establish reasonable car hire rules; that Paragraph (2) permits an election and that it is unlikely that appellants would desire to discontinue the allowance of reclaim. The answers to these suggestions are obvious. It may be admitted that the Commission has power to establish reasonable rules, but they must be reasonable and supported by the evidence. A rule which is only supported by the expressed desire of some railroads for a preference and which creates inequalities instead of eliminating them is not reasonable and may not be sustained. This is the case of Paragraph (2).

Nor does Paragraph (2) permit an election to appellants. The thought apparently is that by changing the Per Diem Rules in such fashion as to eliminate reclaim entirely, the necessity of allowing reclaim to nonsubscribers under the order would disappear. The order of the Commission may not be so read. It is definite in imposing certain obligations upon subscriber railroads and conferring certain rights upon nonsubscriber railroads, and these obligations and rights are fixed until the further order of the Commission (R. 100).

Nor may counsel assume that appellants will not desire to entirely abandon reclaim. They may not, as a matter of fact, but it cannot be said definitely by anyone that they would not prefer to do it rather than sustain

the uncompensated losses which the order imposes upon them.

At the bottom of page 22 of the brief, it is also inferred that under Paragraph (4) of the order, nonsubscriber roads may be required to pay reclaim to subscribers, but this is obviously not so. Paragraph (4) of the order only prescribes the application of the Per Diem Rules with respect to designated railroads, in so far as those rules relate to the payment of per diem and the making of settlements direct with car owners. And even if Paragraph (4) of the order had the effect contended for by counsel, it still excepts railroads less than 100 miles in length and which deliver back to each connecting subscriber railroad all freight cars received from it. Such railroads are entitled to reclaim under Paragraph (2), if they are nonsubscribers, but are not required to allow it under any view of Paragraph (4).

(c) *Paragraph (3) of the Order.* The brief of the United States and the Commission undertakes to justify Paragraph (3) of the order on the ground that it relieves a designated class of railroads of the expense of accounting for non-owned freight cars used by them. A benefit to trunk lines under Paragraph (3) is also inferred, based upon testimony that the total number of reports received by them would be decreased. That the benefit would be actual is not proven on the record. It is said (p. 24) that one witness testified that the trunk lines would incur no extra burden under Paragraph (3), but the witness referred to did not so testify. What he actually said (R. 825) was that if the members of the American Short Line Railroad Association did their own accounting as it is done by the trunk lines, it would impose a burden on the traffic of the country to the extent of $500,000 a month, no part of which would be imposed

on the trunk lines, and that it would be easier for the Burlington Railroad to get all its reports from the trunk lines than from the short lines.

It is easy to conclude that appellants and other carriers similarly situated are benefited by Paragraph (3), but such a conclusion is contrary to the fact. The evidence is clear that Paragraph (3) will impose an expense upon appellants and other carriers similarly situated (R. 160, 167, 168). It is clear, of course, that if every railroad did its own accounting for non-owned freight cars used by it, it would incur some expenditure but the record does not support the statements (p. 25) that the financial burden of such accounting is enormous or that short railroads were unable to become subscribers to the Per Diem Agreement because of that cost. As we have pointed out, those railroads which did not subscribe to the Per Diem Agreement and those which withdrew, took this action because they could not make a profit out of such subscription.

The testimony referred to does not demonstrate any enormous burden resting upon the railroads in question and resulting from their payment of the accounting expense incurred in the operation of their own railroads. It is only an expression of a natural desire to escape an obligation which is not said to be improper. Undoubtedly, the doing of this work is an expense to such railroads. It is equally certain that requiring appellants and other carriers similarly situated to do the work imposes an additional expense upon them. The conclusion that they should, nevertheless, be required to sustain the expense is sought to be justified only because of the expressed desire of short railroads to avoid the expense.

Nor may the transference of this expense from the so-called "short lines" to the trunk lines, including ap-

pellants, be justified by the argument that it is a commendable plan which will benefit the railroad system as a whole. That this will be its effect is but a conclusion of counsel resorted to to support a requirement which is not susceptible of other justification. The Commission made no such finding, and the evidence would not sustain it. Contrary to the argument made, (p. 25), the purpose of Paragraph (3) may not be said to promote public interest or to produce economical transportation cost. Its only effect is to relieve designated railroads of an operating expense incurred in the operation of their own lines and which they should be required to assume by virtue of their legal position as common carriers; this expense being imposed upon their connections. The paragraph produces only a transference of expense.

The car hire provisions of Section (1) of the Act to Regulate Commerce confer no authority upon the Commission to manipulate the operating expense of railroads under the guise of producing economies in national transportation. Nor has the Commission adopted this position. The idea is that of counsel. And in any event, the property of appellants is not yet subject to confiscation without the payment of compensation because it may be thought that such confiscation is a desirable thing.

In the case of a short railroad having only one connection, it might be practical for the connecting line to do the car accounting for such a railroad. In its petition for rehearing filed in this case with the Commission (Part of Ex. 1, certified to this court), the American Railway Association agreed to have its trunk line members assume this burden, although denying that they were under any legal obligation to assume it. Such an offer, however, adds nothing to the propriety of Paragraph (3) of the order.

(d) *Paragraph (5) of the Order.*

The argument in the brief of the United States and the Commission supporting the requirements of Paragraph (5) of the order may be briefly stated. One contention is that the so-called "short lines", in performing the duties incident to the transportation of freight over their rails are likely to have freight cars in their possession a disproportionate length of time, and that, therefore, the Commission was justified in making an apportionment, as between car users, of the total cost of furnishing cars for through transportation. The second contention seems to be that because some trunk lines have voluntarily made concessions to short railroads by permitting the use of their freight cars without requiring payment, the order of the Commission requiring all trunk lines, including appellants, to do the same thing must be held sound.

With respect to the first contention, it is said (p. 27) that the Commission adopted the view that car hire costs incurred in the joint use of cars might reasonably be distributed between participating railroads; that (p. 29) such a determination is not inconsistent with the finding that car owners are entitled to $1 per day for the use of their cars, and that (p. 30) it is the duty of the Commission to equitably apportion the cost of the use of freight cars among the parties to the transportation. In considering this argument, it should be remembered that every operation performed by a short railroad in handling freight is also performed by a longer railroad. The circumstances listed on pages 28 and 29 of the brief are no more than the ordinary incidents of all freight transportation by rail.

It would seem that such circumstances, common to freight transportation on all railroads, would not justify a difference in treatment to railroads because of the

varying length or ability to return cars to the railroad from which they were received. The relative cost of performing these transportation services might be of importance in a case involving the division of joint rates, but this is not a divisions case, and cost of service was not an issue. The fact is, however, that Paragraph (5) of the order does not make an apportionment or distribution of car hire among railroads performing a joint haul.

Thus, we may assume a shipment handled in joint service by two trunk lines and a short railroad benefited by Paragraph (5). Under that Paragraph, one trunk line, in addition to its own car hire, is required to assume part or all of the car hire accruing upon the line of the short railroad, while the other trunk line goes free of any charge beyond that incurred by it for its own use of the freight car. Thus, the only effect of the Paragraph is to impose all or a part of the short railroad's car hire expense upon its immediate connection without regard to whether, under a proper apportionment among all railroads participating in the joint haul, such a distribution of car hire expense is just or equitable.

The argument made by counsel reduces to the proposition that short railroads, because of the expense of their operation, are entitled to some financial relief, and that the Commission has adopted the correct method of granting them that relief. As we have pointed out in our main brief (pp. 88 *et seq.*), this is not correct, under the law and the evidence of record. Moreover, Paragraph (5) does not, as a matter of fact, produce the distribution upon which the argument is based.

The decision of this court in *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186, is cited by counsel (p. 34) to support the conclusion reached, but does not

do so. In this case, there is no agency relationship between trunk lines and short railroads. All railroads affected are common carriers in every sense of the word and should be required to assume the obligations of such carriers. In dealing with the contention made in that case that there was a violation of the Fifth Amendment, this court said, at page 206, after referring to the agency relationship between a receiving carrier and succeeding carriers:

> "It is, therefore, not the case of making one pay the debt of another."

That is, however, the exact situation presented in the case at bar, since appellants and other carriers similarly situated are specifically required by Paragraph (5) of the order to pay the debts incurred by other railroads in their own operation. Moreover, the enactment under consideration in the *Riverside Mills Case, supra,* permitted a recovery by the railroad compelled to pay, from the railroad actually at fault, whereas, in the case at bar, there can be no recovery by appellants of any amounts disbursed by them.

And contrary to the statement in the brief (p. 29), the alleged apportionment of car hire among joint car users is inconsistent with the Commission's finding that car owners should receive $1 a day for the use of their cars (R. 92). Thus, if any appellant uses one of its own cars in joint service with a railroad which is not required to pay car hire under Paragraph (5) of the order, such appellant will necessarily receive less than $1 a day for the use of its car by another common-carrier railroad. Such a result is in plain contradiction of Finding 1 in the Commission's first report.

Nor can Paragraph (5) of the order be justified by a reference to concessions voluntarily made by some railroads. It is true, as we pointed out in our main brief

(pp. 7, 29) that such concessions have been made to a limited extent. The obvious answer to the claim that this justifies the requirements of Paragraph (5) is that a party may voluntarily concede a privilege which it may not be compelled to grant. Thus, a railroad might voluntarily concede some free use of its cars, because it is dealing with its own property, but could not be compelled to make such a concession against its wish and desire. Even if its voluntary concession created an illegal discrimination, it would have to be given the right to cure the discrimination by discontinuing the concession. *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, 346, 347.

Moreover, a requirement that all railroads must suffer because of the dereliction of a few is plainly unjust and unreasonable. The record fails to show that many of the appellants in this case and that hundreds of other railroads in the United States make the concessions referred to in the Commission's first report and in the brief. This being so, what justification could there be for the requirement that they suffer the loss of their property because other railroads have seen fit to voluntarily concede some use of their cars without compensation? Obviously, there is none.

The propriety and necessity of allowing some railroads the free use of non-owned freight cars has never been generally recognized. A few railroads have granted such use for various reasons, and the Railroad Administration traded this concession for concessions made to it. On the whole, however, such free use of freight cars was not allowed, this being a major complaint of the American Short Line Railroad Association on the hearings before the Commission.

We concede that uniformity is at least desirable in the interchange of freight cars and the payment therefor by

roads using but not owning them. We may also concede that the paramount purpose of the Interstate Commerce Act is the production of uniformity in order that preferences and discriminations may be eliminated. But it does not result from this that an order of the Commission making unreasonable requirements and producing an illegal taking of property is to be affirmed merely because the illegality and unreasonableness may be uniform in its application.

(d) *Brief of South Manchester Railroad Company.*

The brief of this appellee is on the same lines as the brief on behalf of the United States and the Commission. The same arguments are made and the order is sought to be justified on the same grounds. We desire, however, to call attention to a few specific statements in this brief.

At page 6, it is pointed out that the Per Diem Code did not contemplate the payment of per diem by subscriber railroads for their use of freight cars belonging to nonsubscribers. This circumstance is also referred to on pages 11 and 24 of the brief as being an outstanding example of the injustices perpetrated by subscriber railroads upon nonsubscribers. Paragraph (1) of the Commission's order (R. 99) is calculated to cure this complaint and appellants do not attack that paragraph of the order.

Moreover, the fact is that under the Commission's order the situation complained of is now reversed. As we pointed out in our main brief (p. 37) appellants and other railroads similarly situated are now deprived of the right to receive per diem when their cars are used by certain other railroads but are required to pay per diem under all circumstances for their use of cars belonging to those railroads. Such a result was condemned by

the principal witness for the American Short Line Railroad Association (R. 160) and, since appellants are certainly common-carrier railroads, is not supported by the reason which justified the requirement of the Per Diem Code. If the inability of nonsubscriber roads to secure per diem was unfair, the result created by the order is equally unfair.

This brief also argues (pp. 24, 25) that under Paragraph (2) of the order, reclaim is required to be allowed by nonsubscriber to subscriber railroads. This is incorrect for the reasons we have heretofore pointed out. At page 26 of the brief, it is said that Paragraph (5) does not mean that a short line is relieved of paying a fair proportion of the car hire expense or that the owner of a car is deprived of reasonable compensation. Such a statement is contradicted by the language of the Paragraph. With respect to cars for return coal loading, no car hire is to be paid by designated lines. And, as we have pointed out, to the extent that appellants and other carriers similarly situated use cars owned by them, jointly with railroads which are relieved of all or a portion of their car hire expense, such appellants will be deprived of reasonable compensation for the use of their cars. A car owner will receive the per diem found proper by the Commission only in cases where it does not participate in the haul. In such case, the connecting lines of railroads favored under Paragraph (5) will be the sufferers.

As a justification for the requirements of Paragraph (3) of the order, the brief alleges (pp. 29, 44) that the accounting for the designated railroads can be performed by appellants and other railroads similarly situated at little additional expense because of their present accounting equipment, and that requiring "short lines" to do

their own car accounting would be contrary to the interest of the railroads and the public. To say the least, these are odd arguments. It is scarcely in appellants' interest that they be required to spend their money in assuming the obligations of other railroads, and the public interest which would be served is not named or otherwise identified. And if ability to do the work is to be the controlling factor, why should not appellants and other railroads similarly situated be required to assume all operating expenses of "short lines"? Such a result would seem to follow.

On page 33 of the brief, it is said that a particular carrier cannot complain if it does not receive $1 per car for each day the car is off its line. We submit that this is not correct, since the Commission in finding (1) in its first report (R. 92) has expressly recognized the right of every common carrier to receive this amount for each day its cars are off its line. Moreover, the order confirms the right to some railroads while denying it to appellants and other carriers similarly situated.

At page 37 of the brief, the *Assigned Car Case*, 274 U. S. 564, is cited as disposing of our claim of confiscation. The case cited does not have this effect, for as we pointed out in our main brief (p. 83), no question was presented in that case concerning the payment of compensation for the use of the private cars there involved.

At page 39, the *New England Divisions Case*, 261 U. S. 184, is cited as justifying the argument that the Commission has power to apportion car hire among railroads jointly using a freight car. We have heretofore pointed out that the order of the Commission does not produce such an apportionment. Moreover, the case cited is not an authority supporting the argument made. In the *New England Divisions Case*, the Commission had pro-

ceeded under a specific statute authorizing it to fix divisions of joint rates as between the carriers performing service under those rates. The complaint made was that the Act was unconstitutional if it authorized a distribution of revenue between carriers upon the basis of the greater financial needs of particular carriers, although it was not claimed that in that case the apportionment resulted in confiscatory rates. In dealing with the point this court held (p. 195) that the argument must fail because the primary jurisdiction to determine the proper share belonging to any carrier was to be fixed by the Commission.

In the case at bar, we concede the jurisdiction of the Commission to fix the reasonable compensation to be received by one railroad for the use of its cars by other railroads, and, as a matter of fact, the Commission has fixed that compensation at $1 per car per day. To this action of the Commission we do not object. Our complaint is that having fixed this compensation as proper, the Commission has denied the right of appellants and other carriers similarly situated to receive it under certain conditions, while confirming to other railroads their right to receive this compensation under all circumstances.

At page 40 of the brief, the case of *Michigan Central R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, is also cited as justifying the argument that the action of the Commission in the case at bar is proper, even though it results in taking appellants' property. The case cited does not so hold. In speaking of the requirement of the Michigan Railroad Commission there in issue, this court said at page 632:

> "Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or the

cars of other carriers for which it is responsible) off its line without compensation. The state court expressly held that Paragraph 7-c provides for reasonable compensation to the carrier whose cars are used in the interchange."

This is not true in the case at bar, since the order specifically requires that appellants and other carriers similarly situated permit the use of their freight cars by other railroads, either without any compensation at all or upon the payment of compensation less than that found reasonable by the Commission. In so far as it relates to the right of a railroad to receive compensation when its cars are used by other railroads, the *Michigan Central Case, supra,* fully supports the decision of this court in *Louisville & Nashville Ry. v. Stockyards Co.,* 212 U. S. 132, 143, 144.

At pages 44 and 45 of the brief, point is made of the statement appearing at page 47 of our brief to the effect that numerous hearings were held by the Commission and a complete record was made. Counsel argues that if the record was complete, it necessarily supports the order made by the Commission. This does not follow. While the record was complete in a way, since it included 5,000 pages of testimony and over 500 exhibits, the evidence taken does not, we submit, support the requirements of Paragraphs (2), (3) and (5) of the Commission's order. Indeed, it is doubtful if any evidence would justify these paragraphs.

Conclusion.

We submit that a consideration of the briefs filed herein by appellees requires a reversal of the judgment entered in the lower court. Reduced to essentials, the claim of appellees is that the order must be approved because the Commission made it; that the Commission's right to regulate is superior to the rights of appellants under the constitution of the United States and that Paragraphs (10) to (14) of Section 1 of the Act to Regulate Commerce should be so construed as to permit the Commission to financially assist some railroads through the medium of car hire, at the expense of their immediate connections.

As a variant of these contentions, it is urged that in some respects the Commission's order should be read in such fashion as to avoid the objections urged against it, in contradiction to the language actually used; that in other respects the conceded taking of appellants' property should be upheld because the amounts taken may not be large; that there should be attributed to the Commission, without any finding to that effect, an intention to benefit national transportation at the expense of appellants and other railroads similarly situated and without return to them. The order must be reasonable and not arbitrary, if it is to be sustained, but counsel only demonstrate its reasonableness by statements that it is so. Nowhere is it argued that the order does not take appellants' property. Nowhere is it argued that appellants receive any compensation for this taking. Conceding the taking without compensation, it is insisted that it is justified by the considerations to which we have referred.

We submit that this is not so. There are limits upon what the Commission may do, and we submit that those limits have been surpassed in this case. No construction of Paragraphs (10) to (14), inclusive, of Section (1) of the Act to Regulate Commerce confers upon the Commission authority to do what it has here done.

Respectfully submitted,

ALFRED P. THOM,
W. F. DICKINSON,
R. N. VAN DOREN,
R. V. FLETCHER,
HERBERT FITZPATRICK,
GEORGE F. BROWNELL,
C. C. PAULDING,
C. B. HEISERMAN,
BEN C. DEY,
F. BARRON GRIER,
EDWARD S. JOUETT,
W. R. C. COCKE,
L. E. JEFFRIES,
FRANK H. TOWNER,
Solicitors for Appellants.